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## Comments

### PROTECTION AFFORDED THE CREDITOR UNDER SECTION 77B OF THE BANKRUPTCY ACT.<sup>1</sup>

Section 77B of the Bankruptcy Act was enacted in a time of great economic uncertainty to prevent the wholesale liquidation of corporations under the ordinary bankruptcy procedure and to avoid the difficulties involved in attempting to reorganize under the equity receivership. Any corporation may reorganize

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1. 48 STAT. 912 (1934), 11 U. S. C. § 207 (1937).  
(166)

under this section except a municipal, insurance, banking, certain railroad corporations,<sup>2</sup> and building and loan associations. In view of the broad scope of the provisions of 77B it is natural that creditors as a class should wonder if their interests are to be sacrificed to procure the continuance of the corporative entity. The purpose of this comment is to show the high degree of protection given the creditor.

On first glance, subdivision b of Section 77B,<sup>3</sup> as it affects creditors, seems very broad in the scope of the plan for reorganization, yet all that this amendment really amounts to is an application of the principles of composition in bankruptcy modified to meet the problems of enterprises corporatively owned.<sup>4</sup> A distinctive feature is the elimination for most purposes of the requirement of foreclosure and judicial sale. The court does not devise a plan of its own. It only has the power to pass upon the fairness of the plan and, if reasonable, to accept it. The judge is not required to cope with the intricate financial problems involved in the ordinary corporative reorganization; instead he deals with problems in equities rather than finances. In this sphere experienced and disinterested judges are better qualified to act than anyone else.<sup>5</sup> It will be seen, therefore, that the equity of a creditor will not be disregarded as a minor detail in the reorganization of a corporation.

The nuisance value of aggressive minority interests in an attempted reorganization through an equity receivership was accentuated by the decision of the United States Supreme Court in *Northern Pacific Railway v. Boyd*.<sup>6</sup> It is apparent that the reorganization of a corporation is a matter of concern to other groups in a community besides creditors and stockholders.<sup>7</sup> Under 77B a small group of creditors or stockholders cannot hold the majority of creditors and stockholders at bay.<sup>8</sup> Although this dissenting minority cannot insist upon its contractual rights, the act does not provide that its interests are to be ruthlessly brushed aside for the benefit of others concerned. The 77B amendment to the Bankruptcy Act merely contemplates small sacrifices for larger

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2. *In re Union Guarantee & Mortgage Co.*, 8 F. Supp. 281 (S. D. N. Y. 1934). Certain types of railroads not engaged in interstate commerce are included under 77B. See *In re New York Title and Mortgage Co.*, 9 F. Supp. 319 (N. D. N. Y. 1934).

3. 48 STAT. 912 (1934), 11 U. S. C. § 207 (1937); "b. A plan of reorganization within the meaning of this section (1) shall include provisions modifying or altering the rights of creditors generally, or of any class of them, secured or unsecured, either through the issuance of new securities of any character or otherwise. . . ."

4. See Gerdes, *Constitutionality of Section 77B of the Bankruptcy Act* (1934) 12 N. Y. U. L. Q. REV. 196.

5. *In re Pilsener Brewing Co.*, 79 F. (2d) 63 (C. C. A. 9th, 1935). See Crasher, *Rights of Creditors in Reorganization* (1935) 10 IND. L. J. 377; Fried, *Effect of Section 77B on Real Estate Reorganizations* (1935) 4 BROOKLYN L. REV. 310.

6. 228 U. S. 482 (1913).

7. See Dodds, *Reorganization Through Bankruptcy: A Remedy for What?* (1935) 48 HARV. L. REV. 1100.

8. See Ernst, *Corporate Reorganizations Under the Bankruptcy Amendments* (1934) 68 U. S. L. REV. 471.

gains to the community. One court has noted<sup>9</sup> that the primary purpose of 77B is "to reach an adjustment acceptable to creditors of the indebtedness of the debtor or if there is an objecting minority to make sure that the adjustment is fair to them, so as to save them from being made the victims of a freeze-out scheme."

The court protects creditors in many different ways. To file a reorganization petition one must have a "provable claim" under subdivision (a) of 77B.<sup>10</sup> The court must decide just who are the creditors with the right to vote. At the very outset of this procedure the court begins to take steps to protect the creditor class. On the other hand, no claimant is to be allowed to have the protection afforded the creditor unless he is a creditor within the meaning of the act. Thus, a trustee of a common law trust is not a debtor of the *cestuis que* trust within 77B merely because of the trust relationship, nor is a stockholder the creditor of a corporation.<sup>11</sup> But a preferred stockholder, who paid as part of his subscription for dividends which had accrued on stock prior to the time of subscription on promises that such money would be refunded at the next dividend date, is a creditor within 77B.<sup>12</sup>

Once it is established that there is a class of creditors within the meaning of the act, any arrangement in the plan for reorganization by which the subordinate rights and interests of the stockholders are attempted to be secured at the expense of the prior rights of any class of creditors comes within judicial denunciation.<sup>13</sup> From this it would seem that no plan is fair and equitable which does not recognize the prior rights of creditors.<sup>14</sup>

However, creditor's rights may not be regarded as inviolate under 77B. It has been noted that for the first time in the history of federal legislation, secured debts are subject to the bankruptcy power and the secured creditor is faced with the possibility that he may be compelled to submit to an alteration of the rights which he acquired by contract.<sup>15</sup> Section 77B does not require that every plan approved as fair and equitable shall be of such character that it would withstand attack by nonassenting creditors asserting their strict legal rights unaffected by any principle of the Bankruptcy Act.<sup>16</sup>

In many district courts, plans for reorganization have been presented to the court for approval before being sent out to creditors and stockholders for their acceptance. This has been considered bad practice and not strictly with-

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9. *In re Philadelphia Rapid Transit Co.*, 11 F. Supp. 865 (E. D. Pa. 1935).

10. *In re Draco Realty Corp.*, 11 F. Supp. 405 (S. D. N. Y. 1935).

11. *Bryan v. Welch*, 74 F. (2d) 964 (C. C. A. 10th, 1935).

12. *In re Lehrenkrauss Corp.*, 10 F. Supp. 14 (E. D. N. Y. 1935).

13. *Louisville Trust Co. v. Louisville, N. A. & Chi. Ry.*, 174 U. S. 674, 684 (1899).

14. *First National Bank of Cincinnati v. Flershem*, 290 U. S. 504 (1934).

15. See Gerdes, *Constitutionality of Section 77B of the Bankruptcy Act* (1934) 12 N. Y. U. L. Q. REV. 196.

16. *Downtown Inv. Ass'n v. Boston Metropolitan Bldgs., Inc.*, 81 F. (2d) 314 (C. C. A. 1st, 1936).

in the contemplation of the provisions of 77B.<sup>17</sup> It gives the proponents of a plan the right to go before creditors and stockholders with the argument that the plan has been approved by the court, and thus acceptances which might never have been given are easily obtained from the cautious and timid. A creditor<sup>18</sup> should be able to insist that it is prejudicial to his rights to have a court approve a plan before the creditor (or two thirds of those holding his type of claim)<sup>19</sup> makes his decision as to the acceptability of that plan.

Let us assume that a plan has been presented to the court in the proper manner by the proper claimant under the act, that the corporation falls within the provisions of the act,<sup>20</sup> and that acceptance has "been filed in the proceeding by or in behalf of creditors holding two-thirds in amount of the claims of each class."<sup>21</sup> In such a situation the creditor will find two great safeguards in the hands of the judge. First, the plan must be filed in "good faith";<sup>22</sup> and secondly, the judge shall confirm the plan only if satisfied that "it is fair and equitable and does not discriminate unfairly in favor of any class of creditors or stockholders, and is feasible."<sup>23</sup>

Equity protects from those who attempt to defraud or deceive.<sup>24</sup> A finding that the petition for reorganization under the Bankruptcy Act was filed in "good faith" is a condition precedent to the court's approval of the plan,<sup>25</sup> and a petition for reorganization of a corporation which is not filed in "good faith" must be dismissed.<sup>26</sup> In determining the matter of "good faith" the court has wide discretionary powers.<sup>27</sup> The burden of satisfying the judges of "good faith" of the petitioners is on the petitioners, and the judgment reached by the court is a summary judgment.<sup>28</sup> This requirement of "good faith" is not only a condition precedent but must continue throughout the proceedings.<sup>29</sup>

17. *Id.* at 321.

18. 48 STAT. 912 (1934), 11 U. S. C. § 207 (a) (1937).

19. 48 STAT. 912 (1934), 11 U. S. C. § 207 (e) (1) (1937).

20. The act includes dissolved corporations. *In re* 211 East Delaware Place Bldg. Corp., 76 F. (2d) 834 (C. C. A. 7th, 1935); *In re* Surf Bldg. Corp., 11 F. Supp. 295 (E. D. Ill. 1934). The act includes joint-stock corporations, associations, and unincorporated companies. *In re* Poland Union, 77 F. (2d) 855 (C. C. A. 2d, 1935).

21. 48 STAT. 912 (1934), 11 U. S. C. § 207 (e) (1) (1937).

22. 48 STAT. 912 (1934), 11 U. S. C. § 207 (a) (1937).

23. 48 STAT. 912 (1934), 11 U. S. C. § 207 (f) (1937).

24. *In re* Knickerbocker Hotel Co., 81 F. (2d) 981 (C. C. A. 7th, 1936).

25. *In re* Wisun & Golub, 84 F. (2d) 1 (C. C. A. 2d, 1936); See *R. L. Witters Associates, Inc., v. Ebsary Gypsum Co.*, 93 F. (2d) 746 (C. C. A. 5th, 1938).

26. *Wilson v. Philadelphia Rapid Transit Co.*, 73 F. (2d) 1022 (C. C. A. 3rd, 1934).

27. *In re* Surf Bldg. Corp., 11 F. Supp. 295 (E. D. Ill. 1934) (example of what is meant by "good faith"); *In re* Kelly-Springfield Tire Co., 10 F. Supp. 414 (D. Md. 1935); *In re* New York Title & Mortgage Co., 9 F. Supp. 319 (N. D. N. Y. 1934); *In re* Williamsport Wire Rope Co., 10 F. Supp. 481 (M. D. Pa. 1935), *appeal dismissed*, *Williamsport Wire Rope Co. v. Bethlehem Steel Corp.*, 78 F. (2d) 1023 (C. C. A. 3rd, 1935); *In re* Surf Bldg. Corp., 11 F. Supp. 295 (E. D. Ill. 1934).

28. *Wilson v. Philadelphia Rapid Transit Co.*, 73 F. (2d) 1022 (C. C. A. 3rd, 1934).

29. *In re* Dutch Woodcraft Shops, 14 F. Supp. 467 (W. D. Mich. 1935).

It is an easy matter to require that a plan must be made in "good faith," but to determine just what constitutes "good faith" is a question not to be decided by rule of thumb. The matter of "good faith" is an issue of fact.<sup>30</sup> "Good faith" is required on the part of all concerned including creditors and stockholders as well as the debtor corporation.<sup>31</sup>

The simplest problem of "good faith" is where a debtor hides assets and attempts to reorganize without disclosing those assets to creditors.<sup>32</sup> Besides the requirement of honesty, "good faith" contemplates practicability. If a reorganization is to be brought about, it must be feasible. Mere honesty or sincerity of purpose is not enough in the light of amendment 77B.<sup>33</sup> In one case a church had liabilities of nearly sixty four thousand dollars and owed the appellant mortgagee six thousand dollars plus twelve hundred and seventy dollars accrued interest. The mortgagee's interest rate was cut from 6½% to 2% and payment on the principal postponed for over a quarter of a century. Obligations exceeding \$10,000 were to be satisfied in five years out of income from uncertain sources estimated at not more than six thousand dollars.<sup>34</sup> It is difficult to see how there could be any possibility of successful reorganization here.

No debtor will be allowed to use Section 77B to effect purposes not contemplated in that section. Where the original debtor was an individual and the corporate debtor was subsequently created for the purpose of permitting reorganization under amendment 77B, the corporation's petition for reorganization was held to lack the "good faith" contemplated by the act.<sup>35</sup>

Whether a petition for reorganization is filed in "good faith" depends upon the facts presented; there is no set formula.<sup>36</sup> Generally the words "good faith" imply an honesty of purpose to save the corporation and its creditors, particularly the latter and thus avoid the evils of liquidation.<sup>37</sup> There should be an actual intent and purpose to use the 77B amendment to effect a plan of reorganization.<sup>38</sup> The petition will be deemed brought in bad faith when brought in respect to a corporation not in need of reorganization, or where the proceed-

30. *O'Connor v. Mills*, 90 F. (2d) 665 (C. C. A. 8th, 1937).

31. *In re Louisiana Oil Refining Corp.*, 20 F. Supp. 580 (W. D. La. 1937).

32. *In re Wisun & Golub*, 84 F. (2d) 1 (C. C. A. 2d, 1936).

33. *In re Tennessee Pub. Co.*, 81 F. (2d) 463 (C. C. A. 6th, 1936); *Tennessee Publishing Co. v. American National Bank*, 299 U. S. 18 (1936).

34. The District court was instructed to dismiss the petition insofar as it affects the mortgage of the appellant. *Provident Mutual Life Ins. Co. of Philadelphia v. University Evangelical Lutheran Church of Seattle*, 90 F. (2d) 992 (C. C. A. 9th, 1937); *Wayne United Gas Co. v. Owens-Illinois Glass Co.*, 91 F. (2d) 827 (C. C. A. 4th, 1937) (a plan of reorganization under which the reorganized company would be started with indebtedness exceeding \$2,000,000 though value of entire property would not exceed \$750,000 was not feasible); *In re A. C. Hotel Co.*, 93 F. (2d) 841 (C. C. A. 7th, 1937) (allowing the creditors to take a chance in reorganization where recovery is visionary).

35. *In re North Kenmore Building Corp.*, 81 F. (2d) 656 (C. C. A. 7th, 1936).

36. *In re Loeb Apartments*, 89 F. (2d) 461 (C. C. A. 7th, 1937).

37. *In re Dutch Woodcraft Shops*, 14 F. Supp. 467 (W. D. Mich. 1935).

38. *In re South Coast Co.*, 8 F. Supp. 43 (D. Del. 1934) (reorganization could be brought much easier under 77B than in equity).

ing instituted under 77B turns out to be abortive and should be relegated to the practice long familiar in ordinary bankruptcy.<sup>39</sup> The basic concept of "good faith" seems to be the *possibility of successful reorganization*, and without the foregoing requirements there can be no successful reorganization.

Should a creditor have reason to believe that a plan is being filed in bad faith he is protected by the act. The statutory provision<sup>40</sup> that three or more creditors "may appear and controvert the facts alleged in the petition" for reorganization refers only to objections based on a controversy involving facts alleged in the petition, and hence a single creditor may urge the debtor's bad faith as a ground for dismissal of the petition.<sup>41</sup> "Good faith" is a conclusion to be drawn one way or the other by the judge from the facts alleged in the petition or elsewhere. Clearly this provision about three creditors has nothing to do with the requirement of "good faith."

Suppose a situation where all prior requirements of amendment 77B are complied with and it is apparent that the purpose of the petition is to end long delays, administrative expenses, statutory periods of redemption, and unreasonable obstructions by minorities, and to effect speedy efficient reorganization upon a feasible basis supported by two-thirds of the creditors.<sup>42</sup> Suppose, also, that the majority of each class of creditors is apparently satisfied by the arrangement to which it gave its approval before the plan is presented to the judge. Under such a set of facts what becomes of the minority creditor?

The cardinal principle in regard to the protection of dissenting creditors is that the protection must be completely compensatory.<sup>43</sup> This does not mean that the form of the security is to remain the same. It does not mean that the creditors are to receive what they might have obtained in a liquidation through

39. *In re Chez Marianne*, 15 F. Supp. 326 (D. C. D. N. Y. 1935) (theory of creditor control of the estate becomes operative).

40. 48 STAT. 912 (1934), 11 U. S. C. § 207 (a) (1937).

41. *Provident Mutual Life Ins. Co. of Philadelphia v. University Evangelical Lutheran Church of Seattle*, 90 F. (2d) 992 (C. C. A. 9th, 1937).

42. See *In re Loeb Apartments*, 89 F. (2d) 461 (C. C. A. 7th, 1937).

43. 48 STAT. 912 (1934), 11 U. S. C. § 207 (B) (5) (1937); see *In re Murel Holding Corp.*, 75 F. (2d) 941 (C. C. A. 2d, 1935). In this case the evidence showed that debtor corporations owned apartment house assessed at \$540,000 and encumbered by \$400,500 first mortgage, on which defaults amounted to almost \$100,000. Under the reorganization plan, pursuant to the Bankruptcy Act, second mortgage was to provide \$11,000 to alter certain apartments and make them more readily leasable, and first mortgagee was to receive 5½% interest but was to forego all amortization payments for ten years. This was held insufficient to justify stay of foreclosure action in state court. *In re Coney Island Hotel Corp.*, 76 F. (2d) 126 (C. C. A. 2d, 1935) (order staying mortgage foreclosure proceedings which had been pending for some 18 months upon petition filed 6 months after passage of corporate reorganization act by debtor seeking reorganization but presenting no plan therefor, held error, particularly where holders of participating mortgage certificates issued by mortgagee opposed reorganization under Bankruptcy Act.); *Central States Life Ins. Co. v. Koplar Co.*, 80 F. (2d) 754 (C. C. A. 8th, 1935) (bankruptcy court in corporate reorganization proceedings has no power to cut off forever, and under any situation thereafter arising, right of trustees in first mortgage on corporation's properties to foreclose).

bankruptcy proceedings. The court is not concerned with the need of the plan but with whether the plan submitted is fair to all interests affected thereby.<sup>44</sup> The fact that the adoption of the plan means that the security of the creditors is to be changed does not put the plan beyond the scope of the act. This change in the form of the security makes reorganization possible and is an important feature of amendment 77B. It has been held not to contravene the Fifth Amendment of the United States Constitution to have the bondholders of an insolvent corporation exchange their securities for participation certificates in a successor corporation entitling them merely to liquidating dividends over an extended period.<sup>45</sup> Also current liabilities of a corporation may be funded into bond liability where the statement of the plan was complete and full opportunity was afforded creditors for a hearing, and the corporation was an old established business with a history of earnings prior to the depression.<sup>46</sup> But a reorganization plan which required bondholders of a Missouri corporation to surrender bonds and accept noncumulative preferred stock in par value amount greatly in excess of the actual value of assets forming the lawful basis of its issue was not approved because the acceptance of the stock would expose the holders to possible financial responsibility and loss.<sup>47</sup> The courts on the whole have been quite hesitant about reducing the rights of bondholders too much.<sup>48</sup> They do not favor substituting the issuance of new bonds to the disadvantage of the bondholder, nor do they approve long extensions of the time of payment.<sup>49</sup>

An important duty of the courts in reorganization proceedings is to carefully consider the rights of the various classes of interests.<sup>50</sup> A reorganization plan cannot be confirmed, if it is not fair and equitable or if it discriminates in favor of one class of creditors or stockholders.<sup>51</sup> This is true even where the requisite percentage of creditors within any class has given its approval. The courts will try to make certain that assets belonging to creditors are not by indirection diverted to stockholders.<sup>52</sup> The rights of creditors are recognized as paramount to those of stockholders.<sup>53</sup>

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44. *In re Baldwin Locomotive Works*, 21 F. Supp. 94 (E. D. Pa. 1937) (the fairness and justness of a reorganization plan as affecting minority should be given careful and discriminating consideration by the bankruptcy court, and whatever court's own views, if any, respecting business judgment displayed in plan under consideration, the court should yield its judgment to that of those financially concerned).

45. *In re Central Funding Corp.*, 75 F. (2d) 256 (C. C. A. 2d, 1935).

46. *In re New Rochelle Coal and Lumber Co.*, 77 F. (2d) 881 (C. C. A. 2d, 1935); *In re Georgian Hotel Corp.*, 82 F. (2d) 917 (C. C. A. 7th, 1936), *cert. denied*, *Allen v. Georgian Hotel Corp.*, 298 U. S. 673 (1936).

47. *Brockett v. Winkle Terra Cotta Co.*, 81 F. (2d) 949 (C. C. A. 8th, 1936).

48. *Francisco Bldg. Corp. v. Battson*, 83 F. (2d) 93 (C. C. A. 9th, 1936).

49. *In re Ogden Park Post Office Bldg. Corp.*, 14 F. Supp. 413 (N. D. Ill. 1936).

50. *Evans v. Shallcross*, 75 F. (2d) 762 (C. C. A. 3rd, 1935).

51. *In re Preble Corp.*, 12 F. Supp. 1002 (D. Maine 1935).

52. *In re New York Railways Corp.*, 82 F. (2d) 739 (C. C. A. 2d, 1936).

53. *In re R. L. Witters Associates*, 19 F. Supp. 648 (S. D. Fla. 1937).



A creditor might be frightened by the class lines drawn in the amendment, and think that his class of creditors can make arrangements which will be adverse to his interests. This is not true.<sup>54</sup> When a corporation undergoes reorganization under the Bankruptcy Act, and the claimant is one of a class, he is bound by the reorganization plan approved by two-thirds of his class, and found by the court to be fair, equitable, and feasible. But such a plan must not discriminate against any creditor within a class and all classes affected must consent to it. The only thing that can happen to such a creditor is that his security interest may be changed to some other form.<sup>55</sup> He may even be heard on appeal.<sup>56</sup>

Reorganization under 77B appears to be a privilege given to the debtor corporation upon the condition that the rights of the creditors are not impinged. Throughout the entire proceedings the creditor is favored more than the debtor. This amendment will not permit the stockholder to disguise as a creditor in order to acquire the advantages accorded the creditor. Each class of creditors is afforded ample protection when the proper procedure is followed, for their consent to the plan is necessary before the court can give its approval. Further protection for the creditor is found in the fact that the plan must be filed in "good faith," and that it must be equitable and feasible. No discrimination against any class of creditors is allowed. The dissenting creditor who does not agree with the two-thirds group in his class is also protected under the act, because he may object to the fairness of the plan. The form of his interest may be changed but his equity cannot be destroyed.

LIPMAN GOLDMAN FELD.

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RES IPSA LOQUITUR—PROCEDURAL EFFECT OF THE DOCTRINE.

The doctrine of *res ipsa loquitur* was developed in the early English common law. In one of the earliest cases to apply the concept embodied in this doctrine, the plaintiff proved that while he was walking along a public street a barrel of flour fell upon him from a window above the defendant's shop, and it was held that there was a sufficient showing to prevent a non-suit, the court saying that this was *prima facie* evidence of negligence.<sup>1</sup> Two years later a similar case came

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54. *In re* 333 North Michigan Ave. Bldg. Corp., 84 F. (2d) 936 (C. C. A. 7th, 1936), *cert. denied*, *Rothfeld v. 333 North Michigan Ave. Bldg. Corp.*, 299 U. S. 602 (1936).

55. See *Continental Illinois Nat. Bank & Trust Co. v. Chicago, Rock Island & Pacific Ry.*, 294 U. S. 648 (1935); *Louisville Joint Stock Land Bank v. Radford*, 295 U. S. 555 (1935); *Cf. Cumberland Glass Manufacturing Co. v. De Witt & Co.*, 237 U. S. 447 (1915).

56. Bondholders who appealed from an order approving a plan of reorganization pursuant to granting of leave to appeal could be heard on appeal even though they had not formally intervened. *In re Day & Meyer, Murray & Young, Inc.*, 93 F. (2d) 657 (C. C. A. 2d, 1938).

1. *Byrne v. Boadle*, 2 H. & C. 722 (1863). See also *Christie v. Griggs*, 2 Camp. 79 (1809); *Kearney v. London, Brighton, and South Coast Ry.*, L. R. 5 Q. B. 411 (1870), *affirmed in Exchequer Chamber*, L. R. 6 Q. B. 759 (1871).

before the Exchequer Chamber. The plaintiff proved that while he was at a certain dock in performance of his duties as customs officer, six bags of sugar fell from defendant's warehouse upon him. It was in this case that Chief Justice Erle laid down the classic rule that has been quoted so often with approval. He said: ". . . where the thing [which caused the injury complained of] is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords *reasonable evidence, in the absence of explanation by the defendants*, that the accident arose from want of care."<sup>2</sup> (Italics the writer's). Though aptly and concisely phrased, this statement of the rule gives rise to many uncertainties when an attempt is made to apply it to a particular case. For example, what is meant by "reasonable evidence?" How is the rule to be applied when the defendant introduces evidence tending to show due care on his part?

From the language used in these and other early English cases, it is not clear just what consequences resulted from an application of the *res ipsa loquitur* doctrine. However, it was seemingly admitted by all the cases that when the plaintiff made out a *res ipsa loquitur* case this was a sufficient showing to take the case to the jury, at least if the defendant introduced no evidence in rebuttal. It is now conceded everywhere that at least this much effect should be given to the rule. The difference of opinion arises as to whether additional effect should be given to the doctrine. There are at least three different views upon this question.<sup>3</sup>

For the sake of convenience these different views will be hereafter referred to as rules I, II, and III. It is, of course, indisputable that the plaintiff always has both the burden of proof, i. e. the risk of nonpersuasion, and the burden of going forward with the evidence to prove the facts that are necessary to establish a *res ipsa loquitur* case. That is to say, the plaintiff must prove those facts that will permit the court to rule that the *res ipsa loquitur* doctrine is applicable. This, however, is obviously a different matter from proof of the ultimate fact of defendant's negligence. When the plaintiff has submitted evidence which if true would be sufficient to make out a *res ipsa loquitur* case, the courts applying rule I hold that if the jury believes this evidence, an inference of negligence is warranted, but that the jury is not compelled to draw such an inference. This view that the *res ipsa loquitur* rule merely gives rise to a permissible inference was well stated in *Sweeney v. Erving*,<sup>4</sup> which was decided by the Supreme Court of the United States. This was an action for personal injuries caused by an X-ray machine. It was held that the *res ipsa loquitur* rule was applicable, and the court said: "In our opinion, *res ipsa loquitur* means that the facts of the occurrence warrant the inference of negligence, not that they compel such an infer-

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2. *Scott v. London & St. Katherine Docks Co.*, 3 H. & C. 596, 601 (1865).

3. For an extensive analysis of the three different views see Heckel and Harper, *Effect of the Doctrine of Res Ipsa Loquitur* (1928) 22 ILL. L. REV. 724.

4. 228 U. S. 233 (1913).

ence; that they furnish circumstantial evidence of negligence where direct evidence of it may be lacking, but it is evidence to be weighed, not necessarily to be accepted as sufficient; that they call for explanation or rebuttal, not necessarily that they require it; that they make a case to be decided by the jury, not that they forestall the verdict. *Res ipsa loquitur*, where it applies, does not convert the defendant's general issue into an affirmative defense. When all the evidence is in, the question for the jury is, whether the preponderance is with the plaintiff."<sup>5</sup> This rule has also been enunciated by some of the state courts.<sup>6</sup> Rule I places upon the plaintiff both the burden of proof and the burden of going forward with the evidence.

The second view taken by some cases<sup>7</sup> is that *res ipsa loquitur* gives rise to a rebuttable presumption of negligence and casts upon the defendant the burden of going forward with the evidence. This is rule II. Under this view if the defendant does not produce any evidence to rebut the presumption, a verdict will be directed against him. Rule II places upon the defendant the burden of going forward with the evidence but not the burden of the proof, which remains upon the plaintiff throughout the trial.<sup>8</sup>

Some cases have gone a step further and have held that the effect of the doctrine is to shift both the burden of proof and the burden of going forward with the evidence upon the defendant to show due care.<sup>9</sup> This will be referred to as rule III. Under this view the defendant not only has to introduce some evidence to avoid a directed verdict against him but must also prove to the jury by the greater weight of the evidence that he was not negligent to avoid a verdict being returned against him.

It is not at all unusual to find each of the three above mentioned rules being applied within a single jurisdiction, usually without an adequate analysis of

5. *Sweeney v. Erving*, 228 U. S. 233, 240 (1913). Accord: *Central R. R. of N. J. v. Peluso*, 286 Fed. 661 (C. C. A. 2d, 1923); *Atlas Powder Co. v. Benson*, 287 Fed. 797 (C. C. A. 3rd, 1923). But *cf.* *Stokes v. Saltonstall*, 38 U. S. 114 (1839). Action against a carrier for injuries to a passenger. An instruction placing on defendant the burden of proving that the accident was not occasioned by the driver's fault was held correct.

6. *Ross v. Cotton Mills*, 140 N. C. 115, 52 S. E. 121 (1905); *Harris v. Mangum*, 183 N. C. 235, 111 S. E. 177 (1922); *Bryant v. Burns-Hammond Const. Co.*, 197 N. C. 639, 150 S. E. 122 (1929). But see *Stewart v. Carpet Co.*, 138 N. C. 60, 50 S. E. 562 (1905); *Dunn v. J. L. Ropen Lumber Co.*, 172 N. C. 129, 90 S. E. 18 (1916). See *Heckel and Harper*, *supra* note 3, at 732.

7. See *Pittsburgh, C. C. and St. L. Ry. v. Hoffman*, 57 Ind. App. 431, 107 N. E. 315 (1914); *Heckel and Harper*, *supra* note 3 at 734.

8. *Everett v. Foley*, 132 Ill. App. 438 (1907); *Alabama & V. Ry. v. Groome*, 97 Miss. 201, 52 So. 703 (1910).

9. *Jacks v. Reeves*, 78 Ark. 426, 95 S. W. 781 (1906); *Southwestern Tel. & Tel. Co. v. Bruce*, 89 Ark. 581, 117 S. W. 564 (1909). See *Weber v. Chicago, R. I. & P. R. R.*, 175 Iowa 358, 151 N. W. 852 (1916); *Potter v. Rorabaugh-Wiley Dry Goods Co.*, 83 Kan. 712, 112 Pac. 613 (1911). *Heckel and Harper*, *loc. cit. supra* note 7; *Morgan, Some Observations Concerning Presumptions* (1931) 44 HARV. L. REV. 906; *Instructing the Jury upon Presumptions and Burden of Proof* (1933) 47 HARV. L. REV. 59; *Bohlen, The Effect of Rebuttable Presumptions of Law upon the Burden of Proof* (1920) 68 U. of PA. L. REV. 307.

the problem involved. It not infrequently happens that it is impossible to determine which, if either, of the rules is being applied because of the most unfortunate practice using "inference," "presumption," and "prima facie case" indiscriminately as though they were synonymous terms. Here also, as in other fields of the law, the dual meaning given to the term "burden of proof" has had no mean influence in adding to the confusion. As the cases are very numerous, it is of course impossible to make any sort of an extensive analysis of the cases in all the different jurisdictions, and for this reason in the following discussion attention in detail will be largely confined to the Missouri cases.

In 1895, the Supreme Court of Missouri held that an instruction that if plaintiff, without negligence on his part, was injured in attempting to board the defendant's train, "then the burden is thrown upon the defendant to show" that it was free from negligence, was properly refused.<sup>10</sup> But later in the case of *Price v. Metropolitan Street Ry.*,<sup>11</sup> where a passenger sued for injuries suffered in a collision, the supreme court affirmed an instruction placing on the defendant the burden of proof to show that it was not negligent.

In the case of *Warren v. Missouri & Kansas Telephone Co.*,<sup>12</sup> decided by the Springfield Court of Appeals in 1917, an instruction placing the burden on defendant to disprove negligence on its part was held to have been properly given. In this case the injury resulted from an excessive current of electricity. The *Sweeney case*, mentioned in the above discussion of rule I, was cited, and the rule there laid down was expressly rejected by the Missouri court. In 1926, in *Watson v. Chicago Great Western Ry.*, an action against a railroad for injury to a passenger when defendant's train was derailed, the Kansas City Court of Appeals declared: ". . . the cause of action alleged is negligence, and the burden of proof is upon the party who affirms negligence to prove it, and this burden continues throughout the case. The doctrine of *res ipsa loquitur*, when analyzed, is merely a presumption of negligence which may be rebutted. In short, the doctrine is that from proof of given facts, a presumption of negligence arises, and this presumption takes the place of actual proof of negligence."<sup>13</sup>

These cases together with other decisions by the Missouri courts led competent writers<sup>14</sup> to conclude that, in some cases at least, in Missouri the *res ipsa loquitur* doctrine had the effect of shifting the burden of proof in the sense of

10. *Schaefer v. St. Louis & S. Ry.*, 128 Mo. 64, 30 S. W. 331 (1895).

11. 220 Mo. 435, 119 S. W. 932 (1909). Accord: *Bond v. St. Louis-San Francisco Ry.*, 315 Mo. 987, 288 S. W. 777 (1926); *Fowlkes v. Fleming*, 322 Mo. 718, 17 S. W. (2d) 511 (1929).

12. 196 Mo. App. 549, 196 S. W. 1030 (1917). See also *Brown v. Consolidated Light & Power Co.*, 137 Mo. App. 718, 109 S. W. 1032 (1909); *Freeman v. Foreman*, 141 Mo. App. 359, 125 S. W. 524 (1910); *DeMun Estate Corp. v. Frankfort Gen. Ins. Co.*, 196 Mo. App. 1, 187 S. W. 1124 (1916); *Russell v. St. Louis & S. F. Ry.*, 245 S. W. 590 (Mo. App. 1922). But cf. *Watson v. Chicago Great W. R. R.*, 221 Mo. App. 621, 287 S. W. 813 (1926).

13. 221 Mo. App. 621, 624, 287 S. W. 813, 814 (1926).

14. See *Heckel and Harper, loc. cit. supra* note 7; *Morgan, supra* note 9, 44 HARV. L. REV. 906.

the risk of nonpersuasion onto the defendant. However, in the case of *McCloskey v. Koplar*,<sup>15</sup> decided in 1932, the majority of the Missouri Supreme Court in an opinion written by Judge Ellison, expressly repudiated the giving of such effect to the doctrine. In the trial court the plaintiff proved that a radiator which had been detached from the heating system in defendant's moving picture theater and left standing in an aisle against the wall tipped over and broke the plaintiff's leg. At the instance of the plaintiff the court instructed the jury: "If you find . . . that while therein plaintiff was passing along an aisle or passageway in the balcony of said theater and that there was a heavy radiator in said theater adjacent to said aisle or passageway, and that said radiator was in possession and control of defendants, and that said radiator fell over and upon plaintiff and injured him as he was passing thereby, then the court instructs you that the presumption is that the falling over of said radiator was occasioned by some negligence of defendants, their agents or servants, and the *burden of proof* is cast upon defendants to rebut this presumption of negligence and show by a *preponderance* of the evidence that the falling over of said radiator was not caused by negligence of defendants. . . ." There was a verdict for the plaintiff. The Supreme Court reversed the case on the ground that this instruction was prejudicially erroneous. In the course of the majority opinion Judge Ellison said:

"The great weight of authority in other jurisdictions is to the effect that the burden cast on the defendant in a *res ipsa loquitur* case is the burden of *evidence*, not the burden of proof; and that the latter burden remains with the plaintiff throughout the trial as in any ordinary case.

"But while this is so, the cases are not in complete accord, as to whether an instruction imposing the 'burden of proof' on the defendant to meet the presumption of negligence, is *prejudicially* erroneous.<sup>16</sup> It will be remembered the *Furnish Case*,<sup>17</sup> referred to a few paragraphs back, held it was not. But however that may be when the instruction in terms merely shifts to the defendant the 'burden' or 'burden of proof' without saying more, the consensus of opinion is that when the instruction further requires the defendant to rebut the presumption or inference of negligence *by a preponderance of the evidence*, it is reversible error."<sup>18</sup>

The majority apparently accepted the view which Judge Ellison conceived to be the weight of authority in other jurisdictions, i. e. that the *res ipsa loquitur* doctrine shifted the burden of the evidence but not the burden of proof.

In a concurring opinion Judge Ragland said that when plaintiff made out a *res ipsa loquitur* case the burden of going forward with the evidence devolved on the defendant. But he went on to say that the doctrine only gave rise to a per-

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15. 329 Mo. 527, 46 S. W. (2d) 557 (1932). Cf. *Glossip v. Kelly*, 228 Mo. App. 392, 67 S. W. (2d) 513 (1934), with language of concurring opinion.

16. Judge Ellison here had in mind the two different meanings attached to "burden of proof."

17. 102 Mo. 438, 13 S. W. 1044 (1890).

18. *McCloskey v. Koplar*, 329 Mo. 527, 46 S. W. (2d) 557, 563 (1932).

missible inference which the jury might draw or not, and quoted with approval from the *Sweeney* case. It is doubtful whether these two statements can be reconciled, if the terminology used is given its orthodox meaning.

Judge Gantt, dissenting, thought that an instruction in a *res ipsa loquitur* case should place the burden of proof upon the defendant to show by a preponderance of the evidence that it was not negligent. The carrier cases seem to have been foremost in the mind of the dissenting judge.

The *McCloskey* case attracted a considerable amount of attention throughout the state and will undoubtedly have a great influence on the future development of the Missouri law upon this point. In 1933, in an action by a passenger against a carrier for damages resulting from injuries sustained when the window of a street car broke and struck the passenger in the eye, the trial court instructed that the presumption of negligence raised in a *res ipsa loquitur* case cast the burden of proof on the defendant to rebut the presumption by a preponderance of the evidence. The St. Louis Court of Appeals held this instruction prejudicial to the defendant and reversed the lower court on the authority of the *McCloskey* case.<sup>19</sup> In *Harke v. Haase*,<sup>20</sup> an action by a pedestrian who had been hit by the defendant's automobile, an instruction placing on the defendant the burden of proof to overcome the presumption of negligence by a preponderance of the evidence was held to be reversible error, in an opinion by the supreme court expressly following the *McCloskey* case. In *Tabler v. Perry*,<sup>21</sup> it was held error to instruct in a *res ipsa loquitur* case that negligence was not presumed, the court saying that such an instruction would confuse the jury as an inference of negligence was permissible.

Two cases decided in 1935, seem to indicate that in some cases at least the *res ipsa loquitur* doctrine gives rise to something more than a mere permissible inference in Missouri. In one of these cases the plaintiff sued for injuries she sustained as a result of the collapsing of one of defendant's chairs. Plaintiff testified that she went with her husband to defendant's store to help make a selection of merchandise; that defendant's salesman procured a chair and invited plaintiff to sit in it; that plaintiff did not see anything wrong with the chair; but that it collapsed when she sat in it. Two boy porters testified that they dusted the chairs each morning and had not noticed anything wrong with the chairs; that if they had noticed anything wrong they would have taken them off the floor. There was no other evidence of negligence, and plaintiff relied upon the *res ipsa loquitur* rule. A verdict was returned for defendant. The trial court then sustained plaintiff's motion for a new trial on the ground that the verdict was against the weight of the evidence. On appeal by the defendant this order was

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19. *Pennifold v. St. Louis Public Service Co.*, 59 S. W. (2d) 713 (Mo. App. 1933). See also *Glasco Elec. Co. v. Union Elec. Light & Power Co.*, 332 Mo. 1079, 61 S. W. (2d) 955, 957 (1933).

20. 335 Mo. 1104, 75 S. W. (2d) 1001 (1934). See also *Williams v. St. Louis-San Francisco Ry.*, 337 Mo. 667, 85 S. W. (2d) 624 (1935).

21. 337 Mo. 154, 85 S. W. (2d) 471 (1935).

sustained by the St. Louis Court of Appeals,<sup>22</sup> the court saying that plaintiff's evidence made a "prima facie case" and that it was then up to defendant to explain in order to escape liability. In *Harnett v. May Department Stores Co.*,<sup>23</sup> plaintiff's evidence was to the effect that while plaintiff was riding on the defendant's escalator in the defendant's store the escalator stopped and violently jerked, jarred, and jolted, causing plaintiff to fall. The trial court instructed the jury that if plaintiff's evidence was believed, ". . . then you may infer that it was occasioned by some negligence of defendant, and the burden of bringing forward evidence is upon the defendant to rebut this inference of negligence and establish the fact that there was no negligence on its part, and that the injuries resulted from some cause which the highest degree of care would not have avoided." There was a verdict for plaintiff, and the defendant appealed. The St. Louis Court of Appeals held this instruction to be correct, and then went on to declare: "Instructions similar to this, but much more favorable to the plaintiff, respecting the presumption arising and the burden imposed under the res ipsa loquitur rule, have received the approval of our Supreme Court for a half century or more."<sup>24</sup> The court also said: "It thus appears that the presumption arising under the res ipsa loquitur rule, as it has been recognized by our Supreme Court from the earliest times, in passenger cases, such as this, to which the rule has peculiar application, is not a mere inference such as may be drawn or not by the jury as they see fit, but it is a rebuttable presumption of law, regarded as necessary to the protection of the public against the negligence of persons in the exclusive control of instrumentalities of carriage involved in accidents and having peculiar and usually exclusive knowledge of the causes of such accidents."<sup>25</sup> The defendant relied upon the *McCloskey* case, but the court distinguished this case on the ground that the instruction disapproved by the *McCloskey* case placed on the defendant the burden of proof to rebut the presumption of negligence and to show *by a preponderance of the evidence* that the defendant was not negligent.

The *McCloskey* case was cited with approval in *Lober v. Kansas City*<sup>26</sup> and again in *Pandjiris v. Oliver Cadillac Co.*<sup>27</sup> In the latter case the defendant, having introduced rebutting evidence, argued that the presumption raised by the res ipsa loquitur doctrine then vanished and that therefore there should have been a directed verdict for the defendant. This argument was rejected, quite properly it seems, by the Missouri Supreme Court; for, assuming that the doctrine gives

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22. *Herries v. Bond Stores*, 84 S. W. (2d) 153 (Mo. App. 1935). For statutory limitation on the granting of new trials on the ground that the verdict is against the weight of the evidence, see Mo. REV. STAT. (1929) § 1003.

23. 85 S. W. (2d) 644 (Mo. App. 1935). For a proposed model instruction see *Harke v. Haase*, 335 Mo. 1104, 75 S. W. (2d) 1001 (1934).

24. *Harnett v. May Department Stores Co.*, 85 S. W. (2d) 644, 645 (Mo. App. 1935).

25. *Id.* at 648.

26. 74 S. W. (2d) 815 (Mo. 1934).

27. 339 Mo. 711, 98 S. W. (2d) 969 (1936).

rise to a rebuttable presumption, the introduction of rebutting evidence by the defendant would only take the presumption as a rule of law out of the case and would not destroy the inference, which as a matter of reasoning, may still remain.<sup>28</sup>

Nevertheless, it is submitted that the *McCloskey* case should not be taken as the last word on the matter here under discussion. The majority of the court there apparently acceded to the proposition that the *res ipsa loquitur* doctrine had the effect of shifting to the defendant the burden of going forward with the evidence. If however this is the only burden that is on the defendant, there seems to be no reason for instructing the jury that there is any burden on defendant. The burden of the evidence operates only on motion requesting the judge to dispose of the issue without leaving the question open to the jury's deliberations. If the court thinks there is enough evidence to take the case to the jury and so rules, then the only burden which the jury could possibly be concerned with is the burden of proof in the sense of the risk of nonpersuasion. It seems that the jury is never concerned with the burden of producing evidence, as this question must of necessity be disposed of by the trial judge before the case is submitted to the jury.

It is generally true that if the party having the burden of going forward with the evidence does not sustain this burden by the introduction of evidence, the issue will be disposed of by a ruling of the judge without leaving the question to the jury. The burden of producing evidence is satisfied only when the party having the burden has produced sufficient evidence to warrant the jury in finding in his favor, although not necessarily requiring the jury to so find. Logically then it might be said that if the defendant has the burden of the evidence and he submits no proof, a verdict should be directed for the plaintiff. However, it is commonly said that there cannot be a directed verdict in Missouri for the party having the burden of the proof. The reason usually given for this rule is that the credibility of witnesses and of their testimony, even if uncontradicted, is a question for the jury.<sup>29</sup> Under the rule laid down in the *Gannon* case,<sup>30</sup> there could not be a directed verdict for the plaintiff even though the defendant introduced no evidence. It would seem however that this rule would impose no objection to an instruction to the jury that if they believed the parts of plaintiff's evidence necessary to make out a *res ipsa loquitur* case, then they should return a verdict for the plaintiff. There seems to be no doubt that a verdict should be directed for the defendant when the evidence of both the plaintiff and the defendant disproves negligence.<sup>31</sup> In some cases in other jurisdictions there have been directed verdicts for plaintiffs in *res ipsa loquitur* cases.<sup>32</sup>

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28. See 5 WIGMORE, EVIDENCE (2d ed. 1923) § 2491.

29. *Gannon v. Laclede Gas Light Co.*, 145 Mo. 502, 46 S. W. 968, 47 S. W. 907 (1898); *Young v. Wheelock*, 333 Mo. 992, 64 S. W. (2d) 950 (1933).

30. 145 Mo. 502, 46 S. W. 968, 47 S. W. 907 (1898).

31. *Brown v. Consolidated Light, Power & Ice Co.*, 137 Mo. App. 718, 109 S. W. 1032 (1908).

32. See Comment (1936) 22 WASH. U. L. Q. REV. 100; Sunderland, *Direct-*



However, in Missouri it seems that in any case the *res ipsa loquitur* doctrine is sufficient to take the case to the jury, with a possibility of the verdict being set aside if it is against the weight of the evidence. On authority it seems at least arguable that in some types of *res ipsa loquitur* cases greater effect may be given to the rule in this state. In *Myers v. City of Independence*,<sup>33</sup> decided by the Missouri Supreme Court in 1916, there is an intimation that the court believed that the effect given the doctrine may depend on the type of case involved. The court there declared: "It [the *res ipsa loquitur* doctrine] is a rule of evidence arising in some cases to the height of a presumption, and always, in cases to which it applies, entitling the party entitled to its benefit to go to the jury on the question of negligence."<sup>34</sup>

Though the problem apparently has not been dealt with—at least consciously—in the cases in this manner, it seems not unreasonable on principle to suggest that whether rule I, or rule II, or rule III should be applied in a given case should depend upon the type of fact situation involved. The doctrine of *res ipsa loquitur* is based upon the comparative convenience of producing evidence, the balance of probability, and possibly in some cases, e. g. the carrier cases, a judicial policy to make more effectively enforceable the high duty of care imposed by the substantive law. It seems indisputable that each of these factors may vary in different types of cases. Suppose that the facts plaintiff proves to make out a *res ipsa loquitur* case show that the probability of negligence greatly preponderates over the probability of absence of negligence; that all the evidence is readily available to the defendant but absolutely inaccessible to the plaintiff; that the defendant owed the plaintiff a very high duty of care. The writer believes that in such a case a court should apply rule II or rule III, but that the same court might reasonably apply rule I in a case where there was only a slight preponderance of probability of negligence over absence of negligence, the evidence was not exclusively available to the defendant, and there was a lesser duty of care. Certainly the whole problem deserves a thoughtful reconsideration by the courts.

WILLIAM D. RUSSELL

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#### SOME PROBLEMS ARISING FROM ACCRETION.

Accretion in Missouri has been an important and active field of the law, due to the unceasing activity of the Missouri river and the changes it so often makes. There are, perhaps, more reported cases on the subject in Missouri, than in any other state. Therefore, the Missouri decisions offer a fertile field for a study of some of the problems arising from accretion.

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*ing a Verdict for the Party Having the Burden of Proof* (1913) 11 MICH. L. REV. 198; 5 WIGMORE, EVIDENCE (2d ed. 1923) § 2495 (b).

33. 189 S. W. 816 (Mo. 1916).

34. *Myers v. City of Independence*, 189 S. W. 816, 822 (Mo. 1916).

*General Nature.* Accretion may be defined as land formed by gradual deposits of alluvial soil, through natural causes, to land bordering on water.<sup>1</sup> When land is acquired by the gradual recession of the water, it is said to be acquired by reliction (or dereliction);<sup>2</sup> but as there is no distinction in legal effect between soil formed by accretion, and that uncovered by reliction,<sup>3</sup> they are treated as though they were the same. In contrast with accretion is the sudden removal of land, from one place, and its sudden deposit in another place, by action of the water. This is spoken of as avulsion,<sup>4</sup> as is also land left when a river suddenly changes its course, so that its old bed is no longer under water.

Accretion is never a problem along nonnavigable rivers, as a riparian proprietor owns the land to the center of the river, unless express words of description exclude the bed of the river, and therefore would own any accretions or islands on his side of the center.<sup>5</sup>

*Ownership of Accreted Land.* Land formed by accretion ordinarily becomes the property of the owner of the land to which it attaches.<sup>6</sup> The doctrine applies as well to land bordering on lakes, as to land bordering on rivers,<sup>7</sup> but the land must actually border on the river or lake, and not be separated from it by an intervening strip of land.<sup>8</sup> The fact that accretions form first in front of the land of one riparian owner, and have their first point of contact with his soil, does not entitle him to all accretions later formed to this, if they later extend in front of the land of an adjoining riparian owner. The adjoining owner has a right to a portion of the accretions formed to his land, as it would be unjust to cut the adjoining owner off from the water, merely because the accretions first started forming to the land of his neighbor.<sup>9</sup>

1. *Benne v. Miller*, 149 Mo. 228, 50 S. W. 824 (1899); 2 *TIFFANY, REAL PROPERTY* (2d ed. 1920) § 534; 3 *WASHBURN, REAL PROPERTY* (6th ed. 1902) § 1880.

2. 2 *TIFFANY, loc. cit. supra* note 1.

3. *Cooley v. Golden*, 117 Mo. 33, 23 S. W. 100 (1893).

4. *Benson v. Morrow*, 61 Mo. 345 (1875); 2 *TIFFANY, loc. cit. supra* note 1; 3 *WASHBURN, loc. cit. supra* note 1.

5. *Benson v. Morrow*, 61 Mo. 345 (1875); *T. L. Wright Lumber Co. v. Ripley County*, 270 Mo. 121, 192 S. W. 996 (1917); *Slovensky v. O'Reilly*, 233 S. W. 478 (Mo. 1921).

6. *Campbell v. Laclede Gas Light Co.*, 84 Mo. 352 (1884); *City of St. Louis v. Lemp*, 93 Mo. 477, 6 S. W. 344 (1887); *Widdecombe v. Chiles*, 173 Mo. 195, 73 S. W. 444 (1903); *City of St. Louis v. St. L. I. M. & S. Ry.*, 248 Mo. 10, 154 S. W. 55 (1912); *Dumm v. Cole County*, 315 Mo. 568, 287 S. W. 445 (1926); *Cashion v. Meredith*, 64 S. W. (2d) 670 (Mo. 1933). This is true even though there must be a change made in the direction of the side lines of the land owned by the riparian owner, in order to give him the same proportionate amount of river frontage as he had before the accretion was formed. *DeLassus v. Faherty*, 164 Mo. 361, 64 S. W. 183 (1901).

7. *Revell v. People*, 52 N. E. 1052 (Ill. 1898).

8. *Smith v. City of St. Louis*, 21 Mo. 36 (1855); *Smith v. St. Louis Public Schools*, 30 Mo. 290 (1860); *Ellinger v. Mo. Pac. Ry.*, 112 Mo. 525, 20 S. W. 800 (1892); *Sweringen v. St. Louis*, 151 Mo. 348, 52 S. W. 346 (1899), *writ of error dismissed*, 185 U. S. 38 (1902).

9. *Crandall v. Allen*, 118 Mo. 403, 24 S. W. 172 (1893); *Pearson v. Heumann*, 294 Mo. 526, 242 S. W. 946 (1922).

The principle upon which the right to accreted land is placed today, is the same as it was under the Civil Law. It was well stated in the case of *Smith v. St. Louis Public Schools*,<sup>10</sup> where it was said: "He who bears the incidental burdens of an acquisition is entitled to its incidental advantages; consequently the proprietor of a field bounded by a river, being exposed to the danger of loss from its floods, is entitled to the increment which from the same cause may be gradually annexed to it."<sup>11</sup> Another reason frequently given is that it is a benefit to the riparian owner to continue to have access to the water, which should not be denied him. There is also a strong policy argument that the riparian owner is the only one who could put the land to productive use, when it is gradually being added, for there would be insufficient land to be of value to the state or anyone other than the riparian owner. These reasons apply to urban lots as well as to those in the country, and therefore the principles of accretion apply to riparian lots in cities and villages.<sup>12</sup>

The authority in this country is that the rules set out above do not apply in cases of avulsion—that is, where the change is sudden and perceptible, such changes do not give the ownership of the newly deposited land to the riparian proprietor.<sup>13</sup> This is in accordance with the nature of the acquisition of an original title to land by accretion, in that the increase must be so slow that it is imperceptible.<sup>14</sup> While it is usually said that in accretion the change must be gradual and imperceptible,<sup>15</sup> it has been pointed out in some of the Missouri decisions that the time of formation is unimportant, when speaking of alluvion formed by the Missouri River, because the character of the soil through which it passes is such that it is readily washed away and reformed.<sup>16</sup> It seems rather

10. 30 Mo. 290 (1860). In accord: *Benson v. Morrow*, 61 Mo. 345 (1875); *Cox v. Arnold*, 129 Mo. 337, 31 S. W. 592 (1899); *Moore v. Farmer*, 156 Mo. 33, 56 S. W. 493 (1900).

11. At the early common law, another reason was emphasized. It was that accreted lands would not be hard enough for many years unless trodden by cattle, for beneficial use by other than the adjoining owner. The cattle of the adjoining owner could give it consistency by treading on it and grazing there, so that the adjoining owner would acquire title by occupation and improvement. See *Gifford v. Yarborough*, 5 Bing. 165 (1828).

12. *Smith v. St. Louis Public Schools*, 30 Mo. 290 (1860); *St. Louis Public Schools v. Risley's Heirs*, 40 Mo. 356 (1867), *aff'd*, 77 U. S. 91 (1869).

13. *St. Louis v. Rutz*, 138 U. S. 226 (1891); *Nebraska v. Iowa*, 143 U. S. 359 (1892); *Wallace v. Driver*, 61 Ark. 429, 33 S. W. 641 (1896); *Kitteridge v. Retter*, 172 Ia. 55, 151 N. W. 1097 (1915); *Fowler v. Wood*, 73 Kan. 511, 85 Pac. 763 (1906); *Iowa Railroad Land Co. v. Coulthard*, 96 Neb. 607, 148 N. W. 328 (1914).

14. *County of St. Clair v. Lovington*, 90 U. S. 46 (1874); *Jefferis v. Land Co.*, 134 U. S. 178 (1890).

15. *Cooley v. Golden*, 117 Mo. 33, 23 S. W. 100 (1893) (where it was said: "Notwithstanding the character of the Missouri River, and that of the soil through which it flows, it is held that the principle applying to accretions and relictions in other streams apply also to it"). In accord: *Rees v. McDaniel*, 115 Mo. 145, 21 S. W. 913 (1893); *Hahn v. Dawson*, 134 Mo. 581, 36 S. W. 233 (1896).

16. *Benson v. Morrow*, 61 Mo. 345 (1875). This case even goes so far as to say that the distinction between accretion and avulsion may be dispensed with in speaking of alluvion formed by the Missouri River, but it will be noted that the case did not involve a sudden change in the course of the river.

clear though, that even if the time of formation is unimportant, a sudden change in the course of the river, that leaves the land so that it can still be identified, will not change the boundaries of the land.<sup>17</sup>

*Various Instances Where Accretion Becomes a Problem.* Ordinarily, the fact that the accretion was produced by artificial means does not affect the application of the doctrine, and the riparian owner is entitled to the accreted land regardless of the cause which produced it.<sup>18</sup> However, a riparian owner cannot extend the limits of his own land at the expense of other riparian proprietors, by producing such accretion.<sup>19</sup>

The same rules apply to accretions formed to an island, as to that formed to the mainland, and the owner of the island is entitled to accretions formed to it.<sup>20</sup> If accretions to an island extend so that they finally meet the mainland (or accretions to the mainland) the owner of the mainland does not thereby get title to the island, or to the accretions formed first to the island.<sup>21</sup> This is true even though the island is not privately owned, as title to the beds of navigable rivers passed from the United States to the individual state, when the state was admitted into the union, including islands in the river, which the state has transferred to counties for school purposes.<sup>22</sup>

The doctrine of accretion applies only to visible land, and not to land covered by water. For one to show title to accretions, he must show that they were formed by deposits against visible land, which he owned, or which his predecessor in title owned.<sup>23</sup> Of course, if the riparian owner owns the bed of the stream, any addition to the bed, although not high enough to extend above the surface of the water, belongs to him, because his ownership extends upwards as well as downwards.<sup>24</sup>

When an occupant acquires title to the mainland through adverse possession, he also acquires title to accretions made during and after the period that he was holding as adverse possessor, since an accretion grows into the title of him who has title to the mainland; and when such title becomes perfect it ex-

17. *Rees v. McDaniel*, 115 Mo. 145, 21 S. W. 913 (1893); *Vogelsmeier v. Prendergast*, 137 Mo. 271, 39 S. W. 83 (1897); *McCormack v. Miller*, 239 Mo. 463, 144 S. W. 101 (1912); *Northstine v. Feldmann*, 298 Mo. 365, 250 S. W. 589 (1923).

18. *Tatum v. City of St. Louis*, 125 Mo. 647, 28 S. W. 1002 (1894); *Whyte v. St. Louis*, 153 Mo. 80, 54 S. W. 478 (1899).

19. *People ex rel. Blakslee v. Commissioners of Land Office*, 135 N. Y. 447, 32 N. E. 139 (1892).

20. *Benson v. Morrow*, 61 Mo. 345 (1875); *Tatum v. City of St. Louis*, 125 Mo. 647, 28 S. W. 1002 (1894).

21. *Cooley v. Golden*, 117 Mo. 33, 23 S. W. 100 (1893); *Hahn v. Dawson*, 134 Mo. 581, 36 S. W. 233 (1896); *Moore v. Farmer*, 156 Mo. 33, 56 S. W. 493 (1900); *Dumm v. Cole County*, 315 Mo. 568, 287 S. W. 445 (1926); *Hecker v. Bleish*, 319 Mo. 149, 3 S. W. (2d) 1008 (1928).

22. *Mo. REV. STAT.* (1929) § 11165; *Frank v. Goddin*, 193 Mo. 390, 91 S. W. 1057 (1906); *Hecker v. Bleish*, 319 Mo. 149, 3 S. W. (2d) 1008 (1928).

23. *Widdecombe v. Chiles*, 173 Mo. 195, 73 S. W. 444 (1903).

24. *TIFFANY, op. cit. supra* note 1, § 536.

tends over the accretion, however recent its formation. The statute of limitations relates back to the time it began to run in favor of the riparian owner.<sup>25</sup>

*Division of New Land.* It is impossible to lay down an absolute rule, whereby the rights of adjoining riparian proprietors to accretions formed in front of their respective tracts of land, can be justly decided under all conditions. As was said in *Gorton v. Rice*,<sup>26</sup> "The effort to maintain for each coterminous proprietor his original waterfront, or his just proportion of that remaining or added to by the change of the river's course, has of necessity caused the adoption of various plans to meet the varying changes of altered conditions." No plan should be adopted that would allow one to claim land as accretion in front of the other's land, so as to cut off the other from the water.<sup>27</sup> In all cases where it is practicable, every riparian proprietor is entitled to as much frontage on the new shore as he had on the old shore.<sup>28</sup> When a river has just receded but has maintained its general course, and the water front of each section of land would be substantially preserved by extending the boundary lines, there is no reason why this should not be adopted as the rule.<sup>29</sup> If, though, this plan does not give to the adjoining proprietors proportionately the same frontage that they had before the change, there are two methods that the courts have adopted to remedy the difficulty. One is that a line should be drawn at right angles with the general course of the river, from a point on the original river bank.<sup>30</sup> The other method is to measure the line of the old river front, and determine the former frontage of each riparian proprietor. Each will then be entitled to his proportionate share of the new river front.<sup>31</sup> This latter method is known as "equitable apportionment."

If there are two pieces of land owned by different persons, and divided by a watercourse, as an island separated from the mainland, and accretions form to each until they come together, the line of contact will be the division line.<sup>32</sup>

*Accretion as a Rule of Law, or a Rule of Construction of Boundaries.* The doctrine of accretion may be regarded as a rule of positive law or it may be looked at as a rule for the construction of boundaries. Suppose the boundary was described as running "to the water." Here the same result would be reached under either view of the doctrine. As a rule for the construction of boundaries the intention of the parties would indicate that they intended the boundary to

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25. *Campbell v. Laclede Gas Light Co.*, 84 Mo. 352 (1884), *aff'd*, 119 U. S. 445 (1886); *Benne v. Miller*, 149 Mo. 228, 50 S. W. 824 (1899).

26. 153 Mo. 676, 55 S. W. 241 (1900).

27. *Gorton v. Rice*, 153 Mo. 676, 55 S. W. 241 (1900).

28. *Crandall v. Allen*, 118 Mo. 403, 24 S. W. 172 (1893).

29. *Gorton v. Rice*, 153 Mo. 676, 55 S. W. 241 (1900).

30. *Ibid.*

31. *Doebbeling v. Hall*, 310 Mo. 204, 274 S. W. 1049 (1925); *cf.* 1 R. C. L. 245.

32. *Buse v. Russell*, 86 Mo. 209 (1885); *cf.* *Point Prairie Hunting and Fishing Club v. Schmidt*, 44 S. W. (2d) 73 (Mo. 1931). Here the land in question was formerly a slough lying between mainland and an island. The slough filled up, and both the owner of the island and mainland claimed the land. Held, that each owned to the center of the slough.

change as the water changed. Of course, the principle of accretion as a rule of law would give the same result. But suppose the boundary running toward the water is limited by a call for distance which happens to take to the water. Here the intention of the parties would seem to be that the boundary was to be fixed without regard to the action of the water and the accreted lands should not pass. The Missouri courts seemingly have applied the doctrine of accretion as a rule of positive law to both situations without noticing that there are really two different situations involved.<sup>33</sup> The results of this doctrine may be more clearly shown by cases involving one whose nonriparian land has become riparian due to the gradual cutting away of intervening land, by the water. Afterwards by accretions formed to such land, the intervening land is rebuilt. If accretion is looked at as a rule of law, as it is in Missouri, this accreted land becomes the property of the one against whose land it was formed, and the person who owned the intervening land before it was cut away and rebuilt will get nothing.<sup>34</sup> This seems very unfair and without much reason to support it, as where land is described by metes and bounds, or has a definite fixed boundary other than the river, there is no reason why, merely because the river by chance cuts that land away and later reforms it, the owner of the land before it was cut away should not be entitled to the new land that was formed in its place. At least it can be said that he is more justly entitled to it than one who was formerly a nonriparian owner, but became one due to the cutting away of intervening land and a later reforming of that land.

Some of the American authorities have adopted a different view, however.<sup>35</sup> They apply accretion as a rule for the construction of boundaries, and when the boundary is fixed by the deed at a specified line, as land described by metes and bounds, without reference to the water, accretions forming to that land do not become the property of its owner. If the land is washed away, and later reformed by accretions to other land, the owner of the land before it was washed away and reformed, is still entitled to it.<sup>36</sup> This view seems to be a logical one, and to be in accord with the intention of the parties. It also seems to accord with the notion of fairness.

OZBERT W. WATKINS, JR.

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33. *Buse v. Russell*, 86 Mo. 209 (1885); *Naylor v. Cox*, 114 Mo. 232, 21 S. W. 589 (1892); *Cox v. Arnold*, 129 Mo. 337, 31 S. W. 592 (1895); *Price v. Hallet*, 138 Mo. 561, 38 S. W. 451 (1896); *Frank v. Goddin*, 193 Mo. 390, 91 S. W. 1057 (1906); *Dumm v. Cole County*, 315 Mo. 568, 287 S. W. 445 (1926).

34. *Widdecombe v. Chiles*, 173 Mo. 195, 73 S. W. 444 (1903); *Doebbeling v. Hall*, 310 Mo. 204, 274 S. W. 1049 (1925).

35. 1 R. C. L. 242.

36. *Ocean City Ass'n v. Shriver*, 64 N. J. L. 550, 46 Atl. 690 (1900); *Allard v. Curran*, 41 S. D. 73, 168 N. W. 761 (1918); *Erickson v. Horlyk*, 48 S. D. 544, 205 N. W. 613 (1925).

## THE SAINT LOUIS COUNTY SEWER LITIGATION

Inadequate sewers to serve the cities, towns and communities in St. Louis county brought about legislation designed to provide the necessary laws whereby sewer districts, partly or wholly within such corporate limits and communities, may be organized. For more than ten years each session of the legislature has had its supply of sewer bills. Statutes have been enacted, modified or repealed, and those laws have been tested numerous times by our supreme court.

The sewer act of 1925<sup>1</sup> was declared invalid because it was a local law in that St. Louis county was the only county in the state bordering on a city of 700,000 inhabitants, or that could border on such a city in the state without legislative or constitutional action.<sup>2</sup> The next law to be enacted was in 1927,<sup>3</sup> and it applied to any county in the state of 75,000 or more inhabitants, a general law to all intents and purposes. This law was repealed by the legislature in 1931.<sup>4</sup> It contained a provision that the 1927 act shall remain in force and effect for the purpose of paying off all outstanding obligations and liabilities and the costs of winding up the affairs of the districts organized under the 1927 act. In the special session of the legislature, 1933-34, another sewer district law was passed for all counties having a population of 150,000 to 400,000 inhabitants. This act applies to the organization of sewer districts in St. Louis county.<sup>5</sup>

Pursuant to these laws, sewer districts were organized in Webster Groves, Wellston, Jennings and certain areas adjacent to each, and other sections. Taxpayers in the districts objected to the assessment, or possible assessment of benefits to finance the sewer districts, and a great many suits were filed in the circuit court, and, as a result of that litigation, there are numerous decisions from the Supreme Court of Missouri which are hereinafter discussed briefly.

The St. Louis county sewer laws are largely patterned after the drainage laws of Missouri. The principles underlying these laws are substantially the same as those involved in the validity and constitutionality of the levee, irrigation and drainage laws, but they apply with greater force to sanitary laws. The levees keep out the water and save the great agricultural and residential areas from overflow; the irrigation laws bring in the water and make the soil productive with the resultant increase in products, homesites, valuation, and added wealth to the state. In the same way, drainage and reclamation projects increase the productivity of the soil, provide more homes and, therefore, the wealth of the state and nation correspondingly increases.<sup>6</sup>

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1. Mo. Laws 1925, p. 343.

2. State *ex inf.* Gentry v. Armstrong, 315 Mo. 298, 286 S. W. 705 (1926).

3. Mo. Laws 1927, p. 439. See Mo. REV. STAT. (1929) §§ 11031 *et seq.*

4. Mo. Laws 1931, p. 355.

5. Mo. Laws 1933-34, p. 119.

6. Turlock Irrigation Dist. v. Williams, 76 Cal. 360 (1888); Egyptian Levee Company v. Hardin, 27 Mo. 495 (1858); Mound City Land and Stock Company v. Miller, 170 Mo. 240, 70 S. W. 721 (1902).

Sanitary laws, like drainage laws, are based upon the police power of the state. That power resides in the people.<sup>7</sup> In *Houck v. Little River Drainage Dist.*,<sup>8</sup> the supreme court of Missouri said:

"The police powers . . . are nothing more or less than the powers of government inherent in every sovereignty . . . that is to say . . . the power to govern men and things. It calls to its aid the subordinate powers—the taxing power, and the power of eminent domain—and their extent is then measured by its purposes. These subordinate powers, each in its sphere, have for their purpose the absolute taking of private property for public use."

It is fundamental that the exercise of the police power may be delegated to municipalities or to other agencies, and if given wholly or partly to municipalities, it may be withdrawn and given to sewer districts organized under the law for the reason that the police power is never surrendered or bargained away. However, as a rule, the general laws, as pointed out in *State ex inf. Gentry v. Curtis*,<sup>9</sup> do not purport and cannot be deemed to give municipalities the exclusive right to construct or own sewers, and the court held that the state may withdraw the police power, or any part thereof, previously granted, from the local authorities, and can delegate the same to other existing agencies or create new agencies.

In the *Curtis* case it was contended that the 1927 law was void in that it created another and additional class of cities in violation of article IX, Section 7 of the Missouri Constitution by which the number of classes is limited to four. The court held that that law neither attempted nor effected any classification of cities and towns, and that it did not purport to define the power of any class of cities. The court pointed out that the power thereby affected would be the police power previously delegated to the city as a governmental agency of the state, as distinguished from the city's proprietary corporate power; that very frequently in the exercise of governmental functions there is an overlapping of territorial jurisdiction, but that such circumstances rest wholly upon facts in no way connected with the classification of cities, towns and villages.<sup>10</sup> On the other hand, sewer districts are not municipal corporations, but like drainage districts, they are "governmental agencies created through an exercise of the police power." Drainage districts are also defined as "public corporations and governmental agencies exercising exclusively governmental functions."<sup>11</sup>

In several of the supreme court decisions construing the sewer laws applicable to St. Louis county, some very fundamental phases of the police power of the state were discussed. For example, in *State ex rel. Becker v. Wellston*

7. *State ex inf. Gentry v. Curtis*, 319 Mo. 316, 4 S. W. (2d) 467 (1928); *State ex rel. Becker v. Wellston Sewer Dist. of St. Louis County*, 332 Mo. 547, 58 S. W. (2d) 988 (1933); Mo. CONST. art. II, § 2.

8. 248 Mo. 373, 384, 154 S. W. 739 (1913), *aff'd*, 239 U. S. 254.

9. 319 Mo. 316, 4 S. W. (2d) 467 (1928); also *State ex rel. Gentry v. Wellston Sewer Dist. of St. Louis County*, 332 Mo. 547, 58 S. W. (2d) 988 (1933).

10. *State ex inf. Gentry v. Curtis*, 319 Mo. 316, 4 S. W. (2d) 467 (1928).

11. *State ex rel. Becker v. Wellston Sewer Dist. of St. Louis County*, 332 Mo. 547, 58 S. W. (2d) 988 (1933).



*Sewer Dist. of St. Louis County*, it was urged that the repeal of the 1927 law by the act of 1931 was not an exercise of the police power; that if the 1927 law was a police measure, actually in the public interest, then the repeal of that law was at least prima facie detrimental to the public use. The court, quoting from *Birmingham Drainage Dist. v. Chicago, Burlington and Quincy R. R.*,<sup>12</sup> said:

"The right to enact these statutes includes the right to repeal or modify them or to limit their application in any manner not inconsistent with some provision of the Constitution limiting the legislative power in that respect."

The above quotation fully answered the contentions of counsel.

The court also pointed out that the views of successive legislatures may differ, and economic and other conditions may change; that the public welfare may call for the repeal of the law, and that the 1931 statute, a repealing act, was as much an exercise of the police power as the law it repealed; and if property owners had any vested or inalienable rights in the Wellston sewer district, they must have been such rights as would stand out against the state's exercise of that sovereign power which the constitution of the state<sup>13</sup> says shall not be abridged.

With respect to such rights as life, liberty and health which might be denied to said owners by the exercise of the police power the court in the *Wellston* case said:

"The state has the power to enforce reasonable police regulations measurably affecting the liberties of the people not alone with respect to their personal conduct and rights, but with respect to the use and enjoyment of their property, as well—and this without the allowance of compensation for such restrictions. As against these regulations the people have no vested rights, no constitutional immunity by contract or otherwise. Thus, it was held in *State ex rel. Cadillac Co. v. Christopher*, 317 Mo. 1179, 298 S. W. 720, that the zoning law of the City of St. Louis was constitutional though land owners were left uncompensated."

In *Kingshighway Presbyterian Church v. Sun Realty Co.*,<sup>14</sup> involving a St. Louis city ordinance which prohibited the location of a gasoline filling station within 250 feet of a church, the supreme court said: "Every citizen holds his property subject to the valid exercise of the police power."

Thus it is seen that the matter of damages passes out of the picture where there is a valid exercise of the police power. However, there are certain rights that may be affected as the court pointed out in *Max v. Barnard-Bolckow Drainage Dist.*,<sup>15</sup> where it said:

"That acts of a governmental agency in the proper exercise of the police power of the state which do not directly encroach upon private property or private rights, though their consequence may impair the use or enjoyment thereof, are held not to be a taking or damaging in the con-

12. 274 Mo. 140, 156, 202 S. W. 404, 409 (1918); *State ex rel. Becker v. Wellston Sewer Dist. of St. Louis County*, 332 Mo. 547, 58 S. W. (2d) 988 (1933).

13. Mo. CONST. art. XII, § 5.

14. 324 Mo. 510, 24 S. W. (2d) 108 (1930).

15. 326 Mo. 723, 731, 32 S. W. (2d) 583, 586 (1930).

stitutional sense and are not compensable being *damnum absque injuria*."

Numerous property owners claimed that their constitutional rights were encroached upon by the 1927 law, and the legality of practically every sewer district organized under the law was attacked. In *State ex rel. Stoecker v. Jennings Sewer Dist. of St. Louis County*,<sup>16</sup> a creditor of the district sought by mandamus to compel the board of supervisors to complete the uniform tax levy of 10 cents per square of 100 square feet to pay warrants issued in the sum of \$10,250.00. The relator also alleged that the board had issued warrants in the sum of \$82,300.00 to pay preliminary expenses of the district and that the 10 cent levy would amount to \$82,300.00; that at the time this suit was filed the 1927 sewer law was repealed by the act of 1931,<sup>17</sup> which act continued in force the 1927 law "for the purpose of paying all outstanding" debts. In other words, the existence of the board of supervisors was continued for the purpose of levying assessments to pay costs of the district although no sewers were built in the Jennings district.

The supreme court denied the peremptory writ on the ground that respondents' pleadings admitted the levy was not uniform in that certain areas were omitted from assessments.

In that case it was urged by the respondents that the uniform levy of 10 cents was for a purely private purpose and in violation of the constitution of Missouri, article 10, Section 3, which requires that taxes be levied for public purposes. The court held that the constitutional provision did not apply to special benefit assessments, as it had previously held in the *Curtis* and in the *Wellston* cases.<sup>18</sup>

In *State ex rel. Boatmen's Nat. Bank of St. Louis v. Webster Groves General Sewer Dist.*,<sup>19</sup> the court in banc issued its writ of mandamus to compel the board of supervisors to levy a 5 cent tax for the payment of costs incurred in the organization of the district. It was there held a mandatory duty of the board to levy the tax to discharge the debts of the district.

The Wellston district was organized under the 1927 law, but no sewers were ever built. The commissioners had filed their report of assessments of benefits or taxes to pay for construction of the sewer. Exceptions and objections to these assessments were filed in the circuit court by property owners, but they were never tried, and hence the commissioners' report had not been confirmed, and, therefore, actual levies or assessments pursuant to that report had not been made for the reason that the final judgment had not been entered. There had been exacted from the property owners in the district a level tax of 10 cents per square of 100 square feet and a second levy of 8 cents per square by the board of supervisors to pay preliminary expenses of \$141,468.97 in organizing

16. 333 Mo. 900, 63 S. W. (2d) 133 (1933).

17. Mo. Laws 1931, p. 355.

18. Both cited *supra* note 9.

19. 327 Mo. 594, 37 S. W. (2d) 905 (1931).

the district. The 1931 legislature passed an act<sup>20</sup> which repealed the 1927 law, and the board of supervisors were proceeding to dissolve and liquidate according to the repealing act.

The relators, who were property owners and taxpayers in the district, contended that they had property rights in the sewer district in that they had land which would be taken or damaged without compensation and due process of law if the sewer project be abandoned by the repeal. They cited Sections 4, 21 and 30 of article 2 of the Missouri constitution in support thereof. The court pointed out that it had long been the law of Missouri that compensation in advance was required only when the proprietary rights were disturbed and that if consequential damages were sustained the property owner had his right of action in the courts.<sup>21</sup>

It was the assessment of the uniform or level taxes that met with great opposition by the taxpayers, but they have been held valid if properly authorized by statute. The court held that the level taxes gave the property owners no vested rights and cited *Houck v. Little River Drainage Dist.*<sup>22</sup> In that case the Supreme Court of Missouri held valid a levy of 25 cents per acre to pay the preliminary expenses for the organization of the drainage district. This decision was affirmed by the Supreme Court of the United States.<sup>23</sup> The courts held the level tax was not a general tax within the meaning of article 10 of the constitution of Missouri, but that said tax was a special assessment for local improvements. The courts could not hold otherwise, because there was no limitation on special assessments except the statute that authorized the districts.

The uniform or level tax is necessarily a part of the final assessment to pay the cost of the improvement of the district. Such a tax is always levied to pay the preliminary costs of the drainage or sewer district, and if such a tax were not levied then the preliminary expenses of the district would have to be a part of and included in the final assessment. The level tax amounts to an advance payment or installment of the final assessment. It may be added also that the rights of property owners in respect to the level taxes are at all times contingent on and subject to such exercise of the police power of the state as the legislature or its agent may reasonably make.

The level tax was again put to the test in *State ex rel. Hotchkiss v. Lemay Ferry Sewer Dist. of St. Louis County*.<sup>24</sup> Like the *Jennings* case, above, it was to compel the levy and collection of additional level taxes for the purpose of paying preliminary expenses incurred in organizing the district under the 1927 law. As in the *Jennings* case no sewer was ever built. The repealing act of

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20. Mo. Laws 1931, p. 355.

21. *Tremayne v. City of St. Louis*, 320 Mo. 120, 130, 6 S. W. (2d) 935, 939 (1928).

22. 248 Mo. 373, 154 S. W. 739 (1913).

23. *Houck v. Little River Drainage Dist.*, 239 U. S. 254 (1915).

24. 92 S. W. (2d) 704 (Mo. 1936).

1931<sup>25</sup> amounted to the dissolution of the district except the payment of all debts incurred. The extra session of the legislature in 1933<sup>26</sup> terminated the board of supervisors and put their powers under the 1927 law with respect to the payment of the bills of the districts in a liquidator, Tegethoff, one of the respondents who was appointed by the Governor to make the necessary levies of taxes and to close up the affairs of the district.

The real question involved was whether or not the second level tax of 10 cents was authorized under the 1927 law when two sections<sup>27</sup> of said law are construed together.

In construing Section 11037 the court held that the board of supervisors, following the language of the statute, could not "levy a uniform tax of more than 10 cents per square of 100 square feet" on the lands within the district.

Section 11062, with respect to additional assessments, provides: "If the uniform tax levied under the provisions of this chapter be found insufficient to pay all such costs, the board of supervisors shall make such additional uniform tax levies as will be necessary to pay such deficiency."

The court's ruling is found in the following language: "If the district should levy less than the maximum limit of 10 cents (referring to Section 11037), then incurred expenses in excess of the levy made, but within the authorized limit of 10 cents, such deficiency should be paid incurred within the limit authorized. Evidently the Legislature intended by the enactment of section 11062 to care for such deficiency by providing for additional levies within the limit authorized, to pay deficiencies within, but not in excess of, such authorized limit. We so construe section 11062."

In other words, if the board had levied 5 cents or any other amount less than 10 cents under Section 11037, the board could in winding up the affairs of the district, levy an amount equal to the difference between the rate levied under Section 11037, and 10 cents, which amount the court holds is the limit authorized by the 1927 law. Two of the judges did not agree with the decision and dissented.

Thus ended all future litigation to assess uniform or level taxes under the 1927 law to pay the preliminary costs and expenses of sewer districts in St. Louis County. However, these are matters of statutory construction and in no way militate against uniform or level taxes to pay initial costs in organizing sewer districts if properly authorized by statute.

The 1933-34 legislature passed a new sewer law,<sup>28</sup> which law is still in force. One of the essential differences between that law and the previous sewer laws, above discussed, is that the present law provides for the issuance and sale of bonds immediately upon the organization of the district, and for levying of an

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25. Mo. Laws 1931, p. 355.

26. Mo. Laws 1933-34, p. 117.

27. See MO. REV. STAT. (1929) §§ 11037, 11062.

28. Mo. Laws 1933-34, p. 119.

ad valorem tax upon all taxable property within the district to pay said bonds and the interest. In other words, the former sewer laws were based upon the levy of special benefit assessments to pay all the costs and the present law provides for a uniform tax levy upon all taxable property in the district. The principle of the uniform levy is justified on the theory that all property within the district is equally benefited.

The present law is rather unique in that it provides that a district may be organized by a petition of 100 taxpaying citizens residing in the district, and in the event the circuit court disapproves the organization of the district, the said petitioners shall be liable for the costs which, of course, includes the cost of preliminary surveys, and other matters.

A sewer district was organized under the present law in the Webster Groves area. Bonds were voted in the sum of \$800,000.00, and in order to test the legality of said bonds a suit was instituted, namely, *State ex rel. Webster Groves Sanitary Sewer Dist. v. Smith*,<sup>29</sup> in which numerous legal questions were raised, questions similar in nature and importance to the ones in the foregoing cases, and, therefore, to discuss them again would be mere repetition.

The foregoing decisions disclose that the right to establish sewer districts for urban and unincorporated areas is well established in Missouri; that the costs of said districts may be paid for either from the special benefit assessments, or from the sale of bonds to be paid by a uniform tax levy on all property in the district; also that a uniform or level tax to pay the preliminary costs of sewer districts, if properly authorized by statute, is valid.

J. B. STEINER. Former associate city counselor  
of the City of St. Louis, Condemnation Division.

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29. 337 Mo. 855, 87 S. W. (2d) 147 (1935).